Supreme Court, U.S.
FILED
JUN 02 1993
OFFICE OF THE CLERK

No. 92-1775

In the Supreme Court of the United States

OCTOBER TERM, 1992

RAWL SALES AND PROCESSING COMPANY, PETITIONER

v.

TRUSTEES, UNITED MINE WORKERS OF AMERICA 1950 PENSION TRUST, ET AL.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF OF BITUMINOUS COAL OPERATORS' ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

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June 2, 1993

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QUESTION PRESENTED

Whether the district court and the court of appeals correctly determined that the "evergreen clause" to which petitioner agreed in the National Bituminous Coal Wage Agreements ("NBCWAs") of 1978 and 1981 requires petitioner (and other similarly situated employers) to continue contributions to the respondent multiemployer pension and health plans for as long as successor NBCWAs require such contributions.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iv
INTEREST OF BCOA AS AMICUS CURIAE	1
STATEMENT OF THE CASE	4
ARGUMENT	10
I. THIS CASE WAS PROPERLY RESOLVED UNDER WELL-ESTABLISHED PRINCIPLES OF CONTRACT LAW THAT DO NOT WARRANT FURTHER REVIEW	12
II. NO ISSUE OF WAIVER IS PRESENTED BY THE FACTS OF THIS CASE	13
III. RAWL'S ASSERTION THAT IT RATIFIED THE 1978 NBCWA "UNWITTINGLY" IS LEGALLY IRRELEVANT AND FACTUALLY INSUPPORTABLE	17
CONCLUSION	20

TABLE OF AUTHORITIES

Cases	Page
Armistead v. Vernitron Corp., 944 F.2d 1287 (6th Cir. 1991)	14
Benson v. Brower's Moving & Storage, Inc., 907 F.2d 310 (2d Cir. 1990), *cert. denied*, 498 U.S. 982 (1990)	18
Bower v. Bunker Hill Co., 725 F.2d 1221 (9th Cir. 1984)	14
Central States, Southeast and Southwest Areas Pension Fund v. Gerber Truck Svc. Inc., 870 F.2d 1148 (7th Cir. 1989)	18
Central States, Southeast and Southwest Areas Pension Fund v. Independent Fruit & Produce Co., 919 F.2d 1343 (8th Cir. 1990), *cert. denied*, 112 S. Ct. 59 (1991)	18
Chicago Tribune Co. v. NLRB, 974 F.2d 933 (7th Cir. 1992)	14
Connors v. Link Coal Co., 970 F.2d 902 (D.C. Cir. 1992)	2, 5, 13, 14
Department of the Navy v. FLRA, 962 F.2d 48 (D.C. Cir. 1992)	14
Keffer v. H.K. Porter Co., 872 F.2d 60 (4th Cir. 1989)	14
Lewis v. Benedict Coal Co., 361 U.S. 459 (1960)	18
Litton Financial Printing Division v. NLRB, 111 S. Ct. 2215 (1991)	14, 15
McGlothlin v. Connors, 142 F.R.D. 626 (W.D. Va. 1992)	7
Metropolitan Edison Co. v. NLRB, 460 U.S. 693 (1983)	13, 15
NLRB v. General Tire & Rubber Co., 795 F.2d 585 (6th Cir. 1986)	16
Southwest Admin., Inc. v. Rozay's Transfer, 791 F.2d 769 (9th Cir. 1986), *cert. denied*, 479 U.S. 1065 (1987)	18
Teamsters Indus. Employees Welfare Fund v. Rolls Royce Motor Cars, Inc., 989 F.2d 132 (3d Cir. 1993)	18

TABLE OF AUTHORITIES—Continued

Page

United Steelworkers v. Connors Steel Co., 855 F.2d 1499 (11th Cir. 1988), *cert. denied*, 489 U.S. 1096 (1989) 14

Statutes

Coal Industry Retiree Health Benefit Act of 1992, Pub. L. No. 102-486, 106 Stat. 2776, 3036 ..... 2, 3, 13

Employee Retirement Income Security Act, 29 U.S.C. § 1104(a) 4

Multiemployer Pension Plan Amendments Act, 29 U.S.C. § 1381 6

Miscellaneous

Coal Commission Report, A Report to the Secretary of Labor and the American People, The Secretary of Labor's Advisory Commission on United Mine Workers of America Retiree Health Benefits (Nov. 1990) 18

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BRIEF OF BITUMINOUS COAL OPERATORS' ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

This brief is submitted by the Bituminous Coal Operators' Association, Inc. ("BCOA"), as *amicus curiae* in support of respondents.[1]

INTEREST OF BCOA AS AMICUS CURIAE

BCOA is a multiemployer collective bargaining association that, for more than forty years, has represented numerous large and small coal companies in negotiations with the United Mine Workers of America ("UMWA" or "the Union"). The collective bargaining agreements re-

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[1] The parties have consented to the filing of this brief. Copies of the letters of consent have been filed with the Clerk of the Court.

sulting from these negotiations are known as National Bituminous Coal Wage Agreements ("NBCWAs"). Each NBCWA establishes the terms and conditions of employment for the production employees of BCOA's member companies and for thousands of unionized employees working under "me-too" agreements between the UMWA and the non-BCOA member companies.[2] The contractual provisions at issue in this case were negotiated by BCOA and the UMWA as part of the NBCWA of 1978, and they were retained in the NBCWAs of 1981, 1984, and 1988.

BCOA and the UMWA are also the settlors of four employee benefit trusts that provide health and pension benefits to more than 120,000 retired coal miners and their dependents. These multiemployer trusts (two of which provide health benefits and two of which provide pension benefits) are known collectively as the UMWA Health and Retirement Funds ("the Funds"). In the context of NBCWA negotiations, BCOA and the UMWA established the structure of the Funds, the language of the trust documents, the level of benefits provided by the Funds, and the level of employer contributions necessary to fund those benefits. Respondents in this case are the Funds' Trustees.

As a result of the Coal Industry Retiree Health Benefit Act of 1992, Pub. L. No. 102-486, 106 Stat. 2776, 3036 (the "Coal Act"), the two health benefit funds (the 1950 Benefit Trust and the 1974 Benefit Trust) have been merged into a new, statutorily created fund called the UMWA Combined Benefit Fund (the "Combined Fund"). The Coal Act also created another multiemployer health fund for retired miners, the UMWA

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[2] In a "me-too" agreement, a non-BCOA employer agrees to be bound by the terms of the agreement negotiated by BCOA and the UMWA. *Connors v. Link Coal Co.*, 970 F.2d 902, 903 (D.C. Cir. 1992).

1992 Benefit Plan (the "1992 Plan").[3] In the Coal Act, Congress recognized the central role that BCOA and the UMWA have played in the Funds, and ensured that that role would continue. Among other things, the Coal Act designates BCOA and the UMWA as the settlors of the 1992 Plan, and gives BCOA and the UMWA authority to appoint Trustees to the 1992 Plan and the Combined Fund.

As a settlor of the Funds and a negotiator of the trust documents at issue in this case, BCOA has an interest in ensuring that the requirements of the trust documents are honored and enforced. In addition, BCOA member companies have a strong economic interest in this litigation. Due to the failure of petitioner and other employers to make contractually mandated contributions to the Funds, the two health benefit trusts now merged into the Combined Fund had reportedly amassed a deficit of approximately $60 million as of February 1, 1993. Under Section 9704(i)(1)(B) of the Coal Act, 106 Stat. 3045, if this deficit is not eliminated through other collections, such as the recovery of delinquent contributions from employers like petitioner, it must be eliminated by signatories to the 1988 NBCWA, including BCOA member companies. Accordingly, vindication of the contractual obligations at issue in this case—and the resulting payment of the amount owed by the petitioner to the benefit trusts—will reduce on a dollar-for-dollar basis the amounts that the Combined Fund Trustees will seek to collect from BCOA members and other signatory employers.

Although BCOA agrees with and supports the position of the respondent Trustees in this case, BCOA's interests

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[3] The 1992 Plan, which has no direct involvement in the present case, provides health care for retirees who meet the statutory eligibility criteria but were not already eligible for and receiving benefits from the 1950 Benefit Trust or the 1974 Benefit Trust as of July 20, 1992.

are not adequately represented by the Trustees. The Trustees are obligated by law to act in the sole and exclusive interest of the Funds' beneficiaries, and cannot represent the interests of employers such as BCOA members. *See* 29 U.S.C. § 1104(a) (fiduciary duty to act "solely in the interest of the participants and beneficiaries").

For all of these reasons, BCOA has been permitted to participate as an *amicus curiae* in this case in both the district court and the court of appeals, to present the viewpoint of the party that negotiated the "evergreen clause" (the key contractual provision at issue) and the viewpoint of the employers that, but for the enforcement of the evergreen clause, would have to pay for petitioner's contractual breaches. As shown in greater detail below, the evergreen clause was designed to prevent this very situation from occurring.

STATEMENT OF THE CASE

Petitioner's statement of the case grossly distorts the facts and ignores the historical context in which this dispute arose. To place this case in proper context, we summarize below the salient factual background on which the court of appeals relied.

The design of the Funds at issue in this case is attributable to peculiarities in the structure of the coal industry itself. As the D.C. Circuit has explained in a previous case, "[t]he continual discovery of new coal mines and exhaustion of old ones leads to a very high turnover of employers in the coal industry. Because of this and the mobility of employees, labor and management in the industry have since 1950 worked out a means for assuring workers' retirement benefits without linking specific workers with specific employers. They have done this through national, multiemployer agreements . . . . All coal companies that join the agreements pay into the same health

and benefit funds at a specified rate per ton of coal produced, and all eligible employees receive benefits from those funds without reference to the employers they happened to be working for at the time of their retirement." *Connors v. Link Coal Co.*, 970 F.2d 902, 903 (D.C. Cir. 1992).

The "evergreen clause" was negotiated in 1978 in response to the concern of BCOA members that some of the coal companies then participating in the multiemployer plans might simply walk away from their pension and health benefit obligations and leave their unfunded, vested liabilities behind, to be borne by other contributors to the multiemployer funds. These concerns became acute during the term of the 1974 NBCWA. Because contributions to the Funds were pegged to the amount of coal produced, a series of wildcat stirkes during the term of the 1974 NBCWA resulted in a dramatic reduction in contributions to the Funds. The Trustees were forced to reduce benefit payments substantially. Then, in December 1977, the 1974 NBCWA expired and the UMWA called a nationwide strike. All contributions to the Funds ceased, and the Trustees suspended benefits altogether.

As negotiations for a successor NBCWA proceeded and the strike continued, BCOA and the Union realized that modifications to the Funds' contribution scheme were necessary. Specifically, the parties recognized that they needed to negotiate an industry-wide solution to the problem of so-called "orphan" retirees, *i.e.*, workers who had retired from an employer no longer mining coal and thus no longer making contributions to the Funds from which the retirees received their benefits. Moreover, by early 1978, the two pension funds had accumulated a staggering *$6 billion* in unfunded, vested liability. Because there were no contractual or statutory impediments to employer withdrawals from the Funds at the time, BCOA realized that, unless something was done, coal operators could

walk away from the multiemployer funds and leave their beneficiaries behind to receive benefits paid for by their competitors.[4] This scenario was referred to during the negotiations as the "last man's club," where the last company to exit the Funds would be left to pay the pension and retiree health care costs of all of its industry competitors. *See, e.g.*, Pet. App. 34.

The evergreen clause was the collectively bargained solution to these problems. BCOA and the UMWA agreed to the evergreen clause during the 1978 NBCWA negotiations, and placed the clause in the trust documents for the Funds, which are incorporated by reference into the contract. The evergreen clause as negotiated in 1978 provided:

> Any employer who employed any participant eligible for coverage under, or who received or receives benefits under, [the Funds], or any Employer who was or is required to make, or who has made or makes contributions to the [Funds], *is obligated and required to comply* with the terms and conditions of the [Funds], as amended from time to time, including, but not limited to, *making the contributions required under the National Bituminous Coal Wage Agreement of 1978, as amended from time to time, and any successor agreements thereto.* [emphasis added]

The evergreen clause thus required all employers participating in the Funds, either pursuant to the 1978 NBCWA or as a result of a "me-too" agreement with the UMWA, to continue contributing to the Funds throughout the term of the 1978 NBCWA *and*

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[4] Congress did not pass the Multiemployer Pension Plan Amendments Act ("MPPAA"), 29 U.S.C. § 1381, until 1980. The MPPAA, for the first time, imposed a statutory obligation on employers withdrawing from a multiemployer pension plan to contribute an actuarially-determined "withdrawal liability" payment to fund their pro-rata share of the plan's unfunded pension liability.

any successor NBCWA, at the rates required by those Agreements.

The evergreen clause was agreed to in 1978 because it served the interests of both management and labor. For the Union, the evergreen clause provided a steady stream of income to the Funds at the uniform rate set in national bargaining. This stabilized the financial condition of the Funds and reduced the pressure on the Union for special deals or cut-rate contributions. Moreover, the actuarial viability of the Funds was, and still is, extremely important to the Union. The Funds provide a uniform level of benefits to approximately 120,000 retired coal miners and their dependents, most of whom are from families that have worked in the mines for generations. *McGlothlin v. Connors*, 142 F.R.D. 626 (W.D. Va. 1992). The Funds also have been of significant political value to the Union because the UMWA, unlike other unions, gives retirees full voting rights in Union elections and retirees outnumber active miners by more than two to one.

For employers, the evergreen clause provided mutual assurances, with the full concurrence of the Union, that all employers would share equally the substantial financial burden of the Funds, and it ensured that no employer or group of employers could obtain an economic advantage over the others by leaving the multiemployer structure and negotiating a lower contribution rate. The clause was, in other words, a *collective commitment* among employers that was placed in the trust documents and thus could not be changed by a single employer or group of employers acting on their own, even if they managed to obtain the concurrence of the Union. The clause provided a level playing field for all employers participating in the Funds, and it was designed to ensure that the field stayed that way. As stated by BCOA's chief benefits negotiator, the evergreen clause "was agreed to in the context of all participating employers saying to the UMWA *and to each other* that they were all in this together, and it was

all for one and one for all." J.A. 650-51 (emphasis added); *see also* J.A. 649, noting that "[t]he UMWA agreed to include such a provision, without any real objection, because as I understood it the UMWA was then in total agreement with the objective of equal treatment for all contributing employers in respect to both benefits and contributions." [5]

Because the evergreen clause served the interests of all concerned, it was agreed to by BCOA and the UMWA with little or no controversy. Significantly, at the time the evergreen clause was first negotiated, petitioner was a member of BCOA.[6] Petitioner authorized BCOA to serve as its bargaining representative in the 1978 negotiations, voted to ratify the agreement negotiated by BCOA (the 1978 NBCWA), and became signatory to this Agreement. Petitioner then remained in BCOA throughout the term of the 1978 NBCWA, authorized BCOA to bargain on its behalf for a successor agreement (the 1981 NBCWA), and became signatory to the 1981 NBCWA as well. The evergreen clause was retained in the 1981 NBCWA, and it has been carried forward in each successor agreement negotiated since that time—*i.e.*, the NBCWAs of 1984 and 1988.

In 1984, however, Rawl attempted precisely the liability-dumping scheme that the evergreen clause was intended to prevent. When the 1981 NBCWA expired, Rawl withdrew from BCOA, terminated its contributions to the Funds, and hunkered down for a protracted battle with its employees and the UMWA. During this period,

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[5] "J.A." refers to the parties' joint appendix in the court of appeals.

[6] Petitioner Rawl Sales & Processing Co. is a wholly-owned subsidiary of the A.T. Massey Coal Company. Rawl is a successor to several other subsidiaries of A.T. Massey that were members of BCOA in 1978 when the evergreen clause was first negotiated. Petitioner does not deny that it then became bound to the NBCWAs of 1978 and 1981.

Rawl did not make any contributions to the Funds, but its retirees continued to receive full and uninterrupted health and pension benefits paid for by the contributions of the remaining employers.

Finally, in 1988, after a long and acrimonious strike, the Union was forced to capitulate, and it accepted the terms of Rawl's final contract offer. Rawl thus succeeded in foisting upon the Union a sweetheart deal that purported to reduce drastically, and ultimately eliminate altogether, Rawl's obligation to contribute to the Funds, notwithstanding the fact that its retirees would remain entitled to undiminished benefits from those Funds, financed by Rawl's competitors.

Both the district court and the court of appeals held that Rawl's special deal with the UMWA was ineffective at eliminating the long-term obligations to which the company had voluntarily agreed by authorizing, ratifying, and executing the 1978 and 1981 NBCWAs. The courts held, not surprisingly, that Rawl must honor its contractual commitments and therefore must contribute to the Funds at the rates required by successor NBCWAs—*i.e.*, the NBCWAs of 1984 and 1988. Rawl cannot receive the benefit of the Funds without sharing the Funds' financial burden. Since 1984, Rawl has received a free ride in the Funds, at the expense of its competitors. Its retirees have received full retirement benefits, paid for by others. Rawl's outrageous position was correctly rejected by the courts below.

Although none of the questions presented for review challenges the interpretation of the relevant contractual language by the courts below, Rawl goes to great lengths in its Statement of the Case to suggest that there is some conflict between the language of Article XX(d) of each NBCWA, which establishes contribution rates and provides that those rates apply only for the term of that NBCWA, and the evergreen clause obligation to make contributions as required by *successor* NBCWAs. As the

court of appeals correctly noted, the time limit of Article XX(d) "comprehends only the termination of the particular NBCWA and the contribution rates specified there; it does not . . . provide for the general termination of the *duty to contribute* to the trusts." Pet. App. 7 (emphasis in original).

ARGUMENT

The court of appeals' decision is correct and further review is not warranted. The decision rests on the interpretation of a single provision in a single collective bargaining agreement dealing with problems that are in many ways special to a single industry. The narrow issue of contract interpretation decided by the courts below will have little, if any, impact beyond the evergreen clause litigation. No overarching unsettled principle of law is at stake, and there is no conflict among the circuits regarding the meaning of the evergreen clause or the methods used by the courts below to ascertain that meaning. Rather, the court of appeals' decision involves the application of well-established and non-controversial principles of contract law to largely undisputed facts. The bargaining history and other evidence on which the courts below relied was voluminous and uncontroverted. As the court of appeals observed, Rawl's submissions fell "far short of what is necessary to undermine or contradict the Trustees' evidence." Pet. App. 11. Moreover, the future significance of the evergreen clause has been substantially diminished by Congress' decision in the Coal Act to adopt a statutory regime for financing future health care for coal industry retirees.

In any event, the issues for which petitioner seeks review are not properly presented by this case. Two of the three arguments now advanced by petitioner were not even made by petitioner or any other party in the courts below, and, as a result, those issues were neither addressed nor decided. As to the third argument now pursued by petitioner, the court of appeals correctly concluded, in

reasoning that also applies to petitioner's other two points, that the issue is not properly in this case. All of petitioner's arguments deal, in one way or another, with the concept of waiver, but this case is not about any alleged waiver. Rather, it concerns a specific exercise of collective bargaining rights and the proper interpretation of the resulting labor agreement. Nothing in federal labor law or policy condemns long-term solutions to thorny problems when those solutions are reached in arm's-length negotiations between management and labor.

Rawl's belated effort to portray itself as the defender of the rights of its employees to select a bargaining representative rings particularly hollow. In the first place, Rawl has no standing to raise such concerns. Second, there is no evidence that a single member of Rawl's workforce is dissatisfied either with the UMWA's performance as collective bargaining representative or with the evergreen clause itself. Third, and most fundamentally, this derivative "waiver" argument, which makes its first appearance in this litigation in the petition, fails for the same reason Rawl's principal waiver arguments fail: Rawl's employees exercised, rather than waived, their right to bargain through the representative of their choosing. The evergreen clause is the result of that bargain, and it is binding.

Finally, Rawl complains that it signed the 1978 and 1981 NBCWAs without understanding them, that the express contractual commitments made in this case were contained in trust documents "not routinely provided" to BCOA members and that, as a "smaller member" of BCOA, it was "unwittingly" lured into signing an agreement designed by and for BCOA's larger members. Rawl's self-professed ignorance, which was first raised *after* the district court had entered summary judgment against it, is neither credible nor availing. Rawl and its parent, one of the nation's largest coal conglomerates, were privy to BCOA's negotiating goals, shared those goals, and had access to all of the documents at issue in

the case. Moreover, Rawl cites no authority for the remarkable proposition that it can avoid a contractual obligation it voluntarily assumed simply by claiming that no one tutored its officers on the agreement's consequences.

I. THIS CASE WAS PROPERLY RESOLVED UNDER WELL-ESTABLISHED PRINCIPLES OF CONTRACT LAW THAT DO NOT WARRANT FURTHER REVIEW

Rawl's petition does not seriously challenge the Trustees' reading of the evergreen clause, its genesis, or its purpose. Such a challenge would be futile in any event; as the court of appeals noted, the Trustees' reading of the evergreen clause is "the only reasonable interpretation" (Pet. App. 6, 11), and the language of the clause, taken in context, is "unambiguous[]" (*id.* at 7), "plain" (*id.* at 8), and "clear in its effect" (*id.* at 9). The court of appeals concluded that the "language of the relevant provisions in the applicable trust and collective bargaining agreements *unambiguously obliges* signatory employers [like Rawl] to contribute to the trusts at the rates specified in the current NBCWA, *irrespective of the employer's failure to sign that NBCWA.* The evergreen clause in the trust documents *clearly* does not include a durational limitation to the employer's duty to contribute to the trusts." *Id.* at 7 (emphasis added). The evergreen language, the court held, is "clear in its effect of permanently binding signatory employers [like Rawl] to the contribution rates established in current NBCWAs . . . ." *Id.* at 9. Moreover, the court of appeals found that the Trustees' reading of this "unambiguous" language was buttressed by "compelling" contemporaneous documentary evidence and unchallenged affidavit testimony from *both* sides of the negotiating table. *Id.* at 8-9.

This thoroughly unsurprising result poses no question worthy of review by this Court. The contract at issue is *sui generis,* the product of the unique characteristics of the coal industry and the historical evolution of the re-

spondent multiemployer plans and the NBCWA. In fact, Rawl concedes that the contractual provision at issue is "unprecedented." Pet. 11. The applicability of this *sui generis* contract has been limited even further by the Coal Act, which has deprived the evergreen clause of any prospective application with respect to health benefits.[7]

II. NO ISSUE OF WAIVER IS PRESENTED BY THE FACTS OF THIS CASE

The issues for which Rawl now seeks review are not presented by this case. The central feature of Rawl's petition—mentioned no fewer than 20 times—is its claim that the evergreen clause results in a "perpetual waiver" of various bargaining rights allegedly guaranteed under the National Labor Relations Act ("NLRA") to Rawl and its employees. But, as the court of appeals aptly noted, every collective bargaining agreement by its very nature "removes [any matter resolved therein] *pro tanto* from the range of bargaining." Pet. App. 17, *quoting Link Coal*, 970 F.2d at 905. The evergreen clause is not a "waiver" of the right to bargain, *see Metropolitan Edison Co. v. NLRB*, 460 U.S. 693 (1983), but rather the product of its exercise.

Rawl concedes that it authorized BCOA to negotiate its labor agreement with the UMWA in 1978 and 1981 (Pet. 5); it concedes that BCOA reached agreement with the Union on terms that included the evergreen clause (Pet. 4-5); and it acknowledges that, by ceding to BCOA the right to negotiate the NBCWA on its behalf, it became bound by the resulting ratified contract, whether or not it knew about or participated in the course of negotiations or thought the agreed-upon terms were wise (*id.* at 20 & n.10).

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[7] In the Coal Act, Congress evinced its preference for a statutory solution to the problem of coal industry health benefits. Although the Fund Trustees will recoup through this litigation amounts previously due under the evergreen clause, Rawl's *future* obligations for health benefits for retirees in the multiemployer plans will be exclusively statutory, not contractual.

Given these facts, Rawl's claim of waiver is just what the court of appeals termed it—specious. Pet. App. 17. "[W]hen a union *waives* its right to bargain about a particular matter, it surrenders the opportunity to create a set of contractual rules that bind the employer and instead cedes full discretion to the employer on that matter. . . . [A] waiver occurs when a union knowingly and voluntarily *relinquishes* its right to bargain over a matter; but where the matter is covered by a collective bargaining agreement, the union *has exercised* its bargaining right and the question of waiver is irrelevant." *Connors v. Link Coal Co.*, 970 F.2d 902, 905 (D.C. Cir. 1992) (emphasis in original), *quoting Department of the Navy v. FLRA*, 962 F.2d 48, 57 (D.C. Cir. 1992). As the Seventh Circuit has observed, "where the contract fully defines the parties' rights as to what would otherwise be a mandatory subject of bargaining, it is incorrect to say that the union has 'waived' its statutory right to bargain; rather the contract will control and the clear and unmistakable intent standard is irrelevant." *Chicago Tribune Co. v. NLRB*, 974 F.2d 933, 937 (7th Cir. 1992) (Posner, J.).

Rawl does not, and could not, dispute that labor and management can agree to extend certain contractual arrangements beyond the termination of the balance of their collective bargaining agreement. *Litton Financial Printing Div. v. NLRB*, 111 S. Ct. 2215 (1991). Similarly, there is no doubt as to the enforceability of a collectively bargained promise to provide "lifetime" health benefits. *See, e.g., Armistead v. Vernitron Corp.*, 944 F.2d 1287 (6th Cir. 1991); *Keffer v. H.K. Porter Co.*, 872 F.2d 60 (4th Cir. 1989); *United Steelworkers v. Connors Steel Co.*, 855 F.2d 1499 (11th Cir. 1988), *cert. denied*, 489 U.S. 1096 (1989); *Bower v. Bunker Hill Co.*, 725 F.2d 1221 (9th Cir. 1984). Nor has Rawl suggested why "federal labor policy" would sanction a promise of lifetime benefits but condemn a long-term commitment to pay for those benefits.

Nonetheless, Rawl insists that the evergreen clause is inimical to "national labor policy" because of its assertedly "perpetual" duration. Rawl cites not a single court or NLRB decision purporting to articulate this national policy, and BCOA is aware of none. To the contrary, courts have consistently recognized that if the parties intend certain contractual obligations to extend beyond the term of their collective bargaining agreement, such promises are binding and enforceable. *See Litton, supra,* and cases cited therein.[8]

Rawl's facile attempt to manufacture a disagreement among the courts of appeals is similarly unavailing. Rawl argues that the D.C. Circuit and the Seventh Circuit, alone among the courts of appeals, have eschewed the "clear and unmistakable" standard for identifying bargaining waivers, and have thus departed from this Court's decision in *Metropolitan Edison Co. v. NLRB,* 460 U.S. 693 (1983).

Rawl's argument is a non sequitur. As explained above, the court of appeals correctly ruled that BCOA

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[8] In fact, Rawl's obligations under the evergreen clause are not "perpetual." By its terms, the evergreen clause obligates the signatory employer to make contributions only as required by successor NBCWAs. When the 1950 Pension Fund became fully funded in 1987, BCOA and the UMWA agreed to reduce to $0.00 the contribution rate for the Fund in the 1988 NBCWA. Accordingly, Rawl's allegedly "perpetual" obligation to the 1950 Pension Fund was nonexistent under the 1988 NBCWA. Similarly, when Congress passed the Coal Act, it terminated Rawl's future "evergreen" obligation to both the 1950 and 1974 Benefit Trusts. Thus, of the alleged "perpetual" contractual obligations to contribute to four UMWA Funds, no contributions are now required for three of those funds. With respect to the fourth fund, the 1974 Pension Plan, negotiations currently are ongoing between BCOA and the UMWA for a successor to the NBCWA of 1988, which expired on February 1, 1993. Contributions will be required to the 1974 Pension Plan under the evergreen clause only if a successor NBCWA is negotiated, and only if that Agreement requires contributions to the 1974 Pension Plan.

members (including Rawl) had, in fact, bargained with the UMWA over employee benefit contributions and that the evergreen clause was the enforceable product of those negotiations. Accordingly, the court found no occasion to apply a standard applicable to the waiver, rather than the exercise, of the right to bargain.

Even if we were willing to assume that there is disagreement among the circuits in the treatment of waiver issues (and we are not),[9] *and* that this case poses a waiver issue of sorts (which it does not), review would still be unwarranted. The court of appeals explicitly held that the Trustees' reading of the NBCWA was "the only reasonable interpretation" (Pet. App. 6, 11), that the language of the evergreen clause was "unambiguous[]" (*id.* at 7), "plain" (*id.* at 8), and "clear in its effect" (*id.* at 9), and that the evidence supporting the Trustees' interpretation was "compelling" (*id.* at 11). Thus, even if one were to classify the evergreen clause as a waiver and to apply the "clear and unmistakable" standard to the facts of this case, the result reached by the court of appeals would remain unchanged, *i.e.*, the intent to "waive" bargaining would be clear and unmistakable.

In a curious variant to its waiver argument, Rawl maintains that the evergreen clause impairs the rights of its employees to decertify the UMWA as their bargaining representative. Rawl's workers, the argument goes, are stuck with UMWA representation in the same way

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[9] Rawl's imaginary conflict in the circuits arises entirely from *NLRB v. General Tire & Rubber Co.*, 795 F.2d 585, 588 (6th Cir. 1986), a case whose facts are assertedly "similar to those of this case." Pet. 26. In fact, however, *General Tire* dealt only with an employer's obligation to bargain over changes in terms and conditions of employment *after* the expiration of the collective bargaining agreement at issue. Here, of course, Rawl undertook by contract, through the evergreen clause, a continuing obligation to contribute to the Funds as long as such contributions are required by successor NBCWAs. No such continuing contractual commitment was involved in *General Tire*.

that Rawl is assertedly stuck with BCOA representation; BCOA and the UMWA will negotiate in the future over contribution rates for the 1974 Pension Fund without input from either Rawl or its workers.

Even apart from Rawl's lack of standing to assert the alleged interests of its employees, and even apart from the complete lack of evidence that Rawl's employees share Rawl's assessment of the employees' interests, this variant of Rawl's argument fails for the same reasons discussed above: the evergreen clause and the NBCWAs that incorporate it are the results of bargaining, not bargaining waivers. Just as Rawl authorized BCOA to negotiate the evergreen clause on its behalf and then voted to ratify it, Rawl's workers elected the UMWA as their bargaining representative to negotiate the agreement and then ratified the results. They are bound by their agreement to the same degree as Rawl.

III. RAWL'S ASSERTION THAT IT RATIFIED THE 1978 NBCWA "UNWITTINGLY" IS LEGALLY IRRELEVANT AND FACTUALLY INSUPPORTABLE

Rawl begins its petition with the claim that it is a small company (Pet. 4 n.1) and the suggestion that it was somehow victimized—duped—into executing the 1978 NBCWA and joining the 1981 NBCWA, without really understanding the agreements (*id.* at 4 n.1, 7, 11). In particular, Rawl argues that it was never told by BCOA that the evergreen clause obligated it to make contributions beyond the term of the collective bargaining agreement. *Id.* at 7, 21 n.11. Thus, Rawl insists, it authorized BCOA's negotiations and ratified the results of those negotiations "unwittingly" (*id.* at 15) and, in negotiating the evergreen clause on its behalf, BCOA exceeded the "power of attorney" it had been granted (*id.* at 22).

Rawl's argument is both legally irrelevant and factually baseless. First, Rawl's claim that it was somehow misled into signing a contract it didn't understand plainly

has no relevance in a collection action brought by the Trustees of the Funds. The Funds, as third-party beneficiaries of the labor agreements signed by Rawl, may enforce Rawl's contractual promises free of any common law contract defenses Rawl might have, unless those defenses go to the legality of the promises themselves. Rawl's claims that it was uninformed or misguided in agreeing to the evergreen clause do not concern the legality of the clause or the NBCWA, and they are thus irrelevant to this case. *See Lewis v. Benedict Coal Co.*, 361 U.S. 459 (1960); *see also Teamsters Indus. Employees Welfare Fund v. Rolls Royce Motor Cars, Inc.*, 989 F.2d 132 (3d Cir. 1993) (fraudulent inducement no defense to trustees' contribution action); *Benson v. Brower's Moving & Storage, Inc.*, 907 F.2d 310 (2d Cir. 1990) (same), *cert. denied*, 498 U.S. 982 (1990); *Central States, Southeast and Southwest Areas Pension Fund v. Independent Fruit & Produce Co.*, 919 F.2d 1343 (8th Cir. 1990) (same), *cert. denied*, 112 S. Ct. 59 (1991); *Central States Southeast and Southwest Areas Pension Fund v. Gerber Truck Svc. Inc.*, 870 F.2d 1148 (7th Cir. 1989) (*en banc*) (same); *Southwest Admin., Inc. v. Rozay's Transfer*, 791 F.2d 769 (9th Cir. 1986), *cert. denied*, 479 U.S. 1065 (1987).

Second, Rawl is not the mom-and-pop operation its petition suggests. As a principal constituent part of the A.T. Massey Coal Co. conglomerate, Rawl is an important component of the fifteenth largest coal operation in the United States, an operation that produced 16.9 million tons of coal in 1989. *See Coal Commission Report, A Report to the Secretary of Labor and the American People*, The Secretary of Labor's Advisory Commission on United Mine Workers of America Retiree Health Benefits at 9-10 (November, 1990). Rawl and its parent are major players in the nation's coal industry, and petitioner's disingenuous attempt to portray itself as a small, helpless victim of industry giants does not withstand even minimal scrutiny.

Moreover, in 1978, when the evergreen clause was being negotiated, E. Morgan Massey was serving as Chairman and Chief Executive Officer of A.T. Massey Coal Co., President of Rawl, and a member of BCOA's Board of Directors. In 1981, when petitioner was reaffirming its contractual contribution obligations, Mr. Massey was serving not only on BCOA's Board of Directors, but also as a member of its CEO Committee and, as such, he "oversaw and directed the 1981 negotiations" between BCOA and the UMWA. Affidavit of E. Morgan Massey at ¶¶ 1, 2, J.A. at 838. Thus, throughout the relevant period, petitioner clearly was not excluded from the affairs of BCOA, including the negotiations about which it now says it knew nothing.

Rawl states in its petition that the trust documents containing the evergreen clause were not "routinely" provided to employees. Pet. 7 n.5. Significantly, however, Rawl never claims that *it* did not have copies of the relevant documents. Similarly, Rawl broadly suggests that the "final" language of the evergreen clause was unavailable to it at the time of ratification in 1978. The undisputed evidence below, however, established that the substance of the evergreen clause and draft language very close to the final version were agreed to—and available for review—in January or February, well before ratification of the 1978 agreement. J.A. 565-66, 598. Moreover, three years *after* approval of the "final" evergreen language in 1978, when Mr. Massey purportedly was "overseeing" BCOA's negotiations with the UMWA, Rawl ratified and executed the 1981 NBCWA incorporating the same language.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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June 2, 1993

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